

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-03

DATE ISSUED: February 20, 1998

ISSUED TO: Glenn Giese, Director, Hettinger County Job
Development Authority
Lester Brackel, Chairman, Hettinger County Board of
Commissioners

CITIZEN'S REQUEST FOR OPINION

On December 26, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Kerry Schorsch asking whether the Hettinger County Job Development Authority (JDA) violated N.D.C.C. § 44-04-18 by denying a request for copies of open public records, by failing to provide copies of open public records within a reasonable time, by refusing to deny access in writing, and by charging an unreasonable fee for copies of open public records.

FACTS PRESENTED

On December 12, 1997, the requester telephoned JDA Director Glenn Giese and requested copies of any documents signed by Norbert Sickler concerning any grant or loan application by the Southwest Multi-County Correction Center (SWMCCC) and any related working documents. Attached to the opinion request was a newspaper article reporting that Mr. Sickler would be applying for grants or loans. Mr. Giese responded there were no requested records available for public disclosure. In his response to an inquiry from my office, Mr. Giese indicated he possessed three forms signed by Mr. Sickler but believed a written request was required and that the forms were confidential and privileged under N.D.C.C. § 44-04-18.4. Mr. Giese also provided copies of these forms to this office.

The same day, December 12, 1997, the requester telephoned JDA Secretary Dwain Barondeau, the County Extension Agent, and requested copies of all minutes of JDA Board meetings since July, 1996. Mr. Barondeau responded he was not an attorney and would need to consult with the JDA Director and the Hettinger County State's Attorney to determine if any portions of the minutes were confidential or exempt from the open records law.

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 2

On December 22, 1997, the requester submitted three written requests to Mr. Giese for copies of JDA records. One of the requests was for copies of the records first requested by telephone on December 12. Each request pertained to the SWMCCC's proposed expansion into New England. Each request also asked that any denial of copies of the requested records be in writing and explain the legal authority for the denial. Mr. Giese has given my office a copy of a letter to the requester dated December 22, 1997, responding to one of the three requests indicating no application had been filed yet and as a result there was nothing available for disclosure. Mr. Giese has explained to my office that he thought the other two requests were simply photocopies of the first request, and he therefore sent only one response.

The same day, December 22, 1997, the requester submitted written requests to Mr. Barondeau for the board minutes first requested by telephone on December 12 and for copies of any records regarding the SWMCCC. Mr. Barondeau responded in writing that he needed time to copy and remove any confidential or exempt information contained in the minutes and that the copies would be available by 4:00 p.m. the next day. He also indicated the charge would be \$2.00 per page as an administrative fee and \$.50 per page copy charge, based on a figure "set" by the Hettinger County Board of County Commissioners (Commissioners).

On December 24, 1997, the requester picked up fifty-five pages from Mr. Barondeau at a total cost of \$137.50 and submitted an additional request for a copy of the order of the Commissioners setting the fee for copies at \$2.50 per page. According to the requester, Mr. Barondeau indicated the Commissioners' order was in writing but refused to provide it or deny access in writing. Mr. Barondeau expressly told this office the Commissioners merely suggested the charge and did not make that suggestion in writing. It does not appear Mr. Barondeau explained either verbally or in writing why the requested record would not be provided.

ISSUES

1. Whether an exception to the open records law applied to the records requested from JDA Director Glenn Giese.
2. Whether it was an unreasonable delay to provide copies of records on December 23, 1997, when the copies were first requested on December 12, 1997.

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 3

3. Whether the JDA's written denial of access and copies on December 22, 1997, responded to all three requests and included the legal authority supporting the denial.
4. Whether charging \$2.50 per page for copies of JDA records was reasonable.
5. Whether failing to provide a copy of a written directive of the Hettinger County Board of Commissioners setting the fee for copies of JDA records was a violation of the open records law.

ANALYSES

Issue One:

All records of a county JDA, as a county agency, are open and accessible to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18; N.D. Const. art. XI, sec. 6; 1996 N.D. Op. Att'y Gen. L-205 (November 7 letter to Gorder). At the time the requester first asked for documents on December 12, 1997, there were three documents signed by Mr. Sickler that fell within the request. Mr. Giese's response to this office and his December 22, 1997, letter to the requester indicate his belief that the three documents were confidential because the application for funds to which the documents would be attached would be confidential until officially submitted.

It appears that Mr. Giese is referring to the open records exemptions in N.D.C.C. § 44-04-18.4 for certain economic development records and other trade secret, proprietary, commercial or financial information. However, the exceptions in this section do not apply to the requested records. First, the exception for economic development records is available only if no previous public disclosure has been made of the intent, identity, or location of an enterprise. Here, it has been reported in the newspaper that the SWMCCC is applying for grant funds. Second, the requested documents were simple forms that did not reveal any trade secret, commercial or financial information regarding the SWMCCC. Finally, the documents were complete in themselves and not working papers. N.D.C.C. § 44-04-18(8). Therefore, it is my opinion that the documents were open records and should have been disclosed in response to the December 12 and December 22, 1997, requests.

Issue Two:

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 4

A request for records need not be made in person, and may not be subject to unreasonable delay. N.D.C.C. § 44-04-18. In other words, a verbal request in person or by telephone has the same effect as a "formal" written request, and the request must be fulfilled or denied within a reasonable time.

The first request to Mr. Barondeau for minutes of the JDA board was made over the telephone on December 12, 1997. A second request for the minutes and other records was made in writing on December 22, 1997, and the records were made available the next day. Approximately seven working days elapsed from the time the first request was submitted until the copies were made available.

Whether records have been provided within a reasonable time will depend on the facts of a given situation, but a delay of seven working days will be closely reviewed by this office. In this situation, several unique factors regarding JDA records in general and the Hettinger County JDA in particular lead me to conclude that the delay was reasonable.

First, minutes of the meetings of a JDA board will frequently include information about current applicants for funds that is either confidential or exempt under N.D.C.C. § 44-04-18.4 and needs to be excised. Second, because there is a legitimate legal and factual question on what information in the minutes must be disclosed, it is appropriate to take a reasonable amount of time to consult with the JDA's attorney, although I would generally expect seven working days to be long enough to obtain that advice. See 1982 N.D. Op. Att'y Gen. 66. These factors are even more relevant when, as in this case, the request was for minutes of all meetings for the past year and a half.

With regard to the Hettinger County JDA, the Hettinger County State's Attorney is a part-time state's attorney and not always available during regular business hours. Second, the JDA secretary is otherwise employed as the County Extension Agent and volunteers for the JDA. Finally, Mr. Barondeau has responded to this office's inquiry with a detailed summary of his personal schedule from the time the request was submitted until the copies were provided. It is evident from this response that Mr. Barondeau immediately and continually attempted to reach the state's attorney and responded in a diligent manner considering his other responsibilities. For these reasons, it is my opinion that the delay in providing the requested copies was reasonable.

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 5

Issue Three:

A new requirement in N.D.C.C. § 44-04-18 is that denials of access to records indicate the legal authority for the denial, and be made in writing upon request. The requests made to Mr. Barondeau and Mr. Giese on December 22 asked that any denial of copies of records be made in writing.¹ As discussed in the analysis for Issue Two, Mr. Barondeau did not deny access to the records but instead reasonably delayed providing copies to determine what information should not be released. Mr. Giese denied access on December 12 and December 22, indicating no records subject to the request were available. As discussed earlier in the analysis for Issue One, this conclusion was incorrect because there were three documents that should have been provided to the requester.

My office has received a copy of a December 22 letter to the requester explaining Mr. Giese's basis for denying access to certain records. The letter states:

In reference to your request for "all records, including correspondence concerning grant or loan applications for Southwest Multi County Correction Center expansion in New England, ND", there have been no grant or loan applications submitted at this date by the Hettinger County JDA on behalf of SWMCCC nor has any action been taken by the Hettinger County Jobs Development Authority board. Therefore, there is nothing available for disclosure.

Although the requester submitted three written requests on December 22, the written response quoted above by Mr. Giese was specifically limited to the records listed in the first request. Mr. Giese has explained to my office that he thought the other two requests were simply photocopies of the first request. A public entity is not required to issue three denials simply because it received three requests at the same time from the same person, and a denial need not necessarily restate verbatim the list of requested documents. However, to be sufficient, a denial must clearly address all the requested records that are not disclosed and must indicate the legal authority supporting the denial of the records. It is my opinion

¹ The opinion requester does not allege he asked for a denial in writing on December 12, 1997.

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 6

that Mr. Giese's written denial did not indicate the legal authority for the denial and did not address all the undisclosed records, and therefore did not comply with N.D.C.C. § 44-04-18(6).

Issue Four:

The open records law allows public entities to charge a "reasonable fee" for copies of open records. N.D.C.C. § 44-04-18(2). "Reasonable fee" is defined to mean the entity's actual cost of making the copy, once access is provided, including labor and materials. In effect, N.D.C.C. § 44-04-18(2) maintains free access to public records but eliminates any expense to the entity of providing the copies. Id. The definition of "reasonable fee" also prohibits public entities from passing on to the requester the expense of locating or providing access to public records, or excising exempt or confidential information. Id.

Mr. Barondeau charged a total fee of \$2.50 per page. No matter how a fee is broken down, N.D.C.C. § 44-04-18(2) limits the fee a public entity can charge to its actual cost of making a copy. Although whether a fee is reasonable will also depend on the facts of a given situation, the largest part of a public entity's actual expense in making copies will usually be the labor charge, which in this case is free assuming Mr. Barondeau made the copies in his capacity as a volunteer secretary for the JDA. It is my opinion that \$2.50 per page greatly exceeds the actual cost to the JDA of making the requested copies.

Issue Five:

The final issue is whether the failure to provide a copy of a written directive of the Commissioners setting the fee for copies of JDA records was a violation of the open records law. It is unclear why Mr. Barondeau would indicate to the requester that the Commissioners "set" the fee in writing. Mr. Barondeau specifically told my office the Commissioners verbally suggested the fee. Under N.D.C.C. § 44-04-21.1, I must accept this fact as true, and it is supported by documents submitted by the requester from Hettinger County officials which also indicate no fee has been set. Therefore, because there was apparently no written directive to disclose, it was not a violation of N.D.C.C. § 44-04-18 for Mr. Barondeau to deny the request for a copy of that directive. The request, however, should have been denied in writing as requested.

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners
February 20, 1998

Page 7

CONCLUSIONS

1. It is my opinion that the JDA violated N.D.C.C. § 44-04-18 when it failed to disclose the three documents it possessed that were signed by Norbert Sickler and concerned the SWMCCC.
2. It is my further opinion that the JDA provided the requested copies of JDA board minutes within a reasonable time.
3. It is my further opinion the JDA's written denial did not address all the undisclosed records and did not indicate the legal authority for the denial of copies of the records.
4. It is my further opinion that the JDA's charge for copies of records was unreasonable.
5. It is my further opinion that the JDA did not violate N.D.C.C. § 44-04-18 when it failed to provide a copy of a requested document that did not exist, but violated that section when the denial was not made in writing.

STEPS NEEDED TO REMEDY VIOLATIONS

The JDA has remedied its failure to provide documents, as much as possible, by providing copies of the records to the requester in a letter dated January 15, 1998.

The JDA has remedied its failure to provide a written denial with supporting legal authority for the two requests for copies that were not disclosed to the requester by providing a written denial of those records on February 8, 1998, stating that no such records exist.

In a January 20, 1998, letter to my office, the JDA indicated it will refund the amount paid by the requester that exceeds \$0.25 per page, and the requester has indicated to my office he agrees that charge is reasonable.

A written denial of the request for a copy of the written order of the Commissioners is not necessary because the requester will receive a copy of this opinion containing the JDA's explanation why the requested record was not provided, i.e. no such record exists.

Sincerely,

ATTORNEY GENERAL OPEN RECORDS OPINION

Hettinger County Job Development Authority and Board of Commissioners

February 20, 1998

Page 8

Heidi Heitkamp

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